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IN THE

Supreme Court of the United States

October Term, 1958

No. 217

STROEHMANN BROTHERS COMPANY and QUALITY BAKERS OF AMERICA COOPERATIVE, INC.,
Petitioners,

v.

HUBER BAKING COMPANY,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS

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As to Respondent's "Summary of Facts" and Denial That the Findings of Fact by the Trial Court Were Disregarded Below

It is noted that respondent commences its "Summary of the Facts" (brief, p. 2) with the statement that "The salient and undisputed facts upon which this action was brought and decided are not set forth in the petition". The two sentences of the "summary" next following are to the effect that the findings of fact by the trial Court are not in serious dispute and that the findings of fact by the Court of Appeals, likewise, are not in serious dispute.

If, then, the facts are not in dispute, respondent's charge that the petition is deficient in its statement of the same invites the question, what are the facts and where are they accurately set forth? The answer, we submit, to which respondent cannot reasonably take exception, is that the facts are as found by the trial Court which heard the witnesses and determined their credibility, and that they are set forth in the decision of Judge Walsh (Appendix B, pp. 1b-9b, of the petition).

An example of "facts", neither found by the trial Court nor supported by the record, but stated in respondent's brief (p. 4) and in the opinion of the Circuit Court (p. 15b), is that the unilateral assignment (characterized by respondent as "An 'agreement' in form of an assignment", being exhibit 3 annexed to the complaint, record p. 16a) "was prepared by QBA's attorneys". Respondent avows (brief, p. 5) that, in 1942, QBA sent to Huber a draft of the assignment, which was not the instrument executed by Huber some two years thereafter.

The finding by the Court of Appeals of an estoppel against QBA, to which much of respondent's brief is devoted, is diametrically opposed to the finding by the trial Court of an estoppel against Huber. Since estoppel must proceed from facts giving rise to equities, it is submitted that respondent accents the cogency of the last of the five reasons presented by petitioner for granting certiorari, to wit, that "The Court of Appeals has disregarded the findings of fact by the District Court which, unless clearly wrong, and the Court did not so find, is contrary to Rule 52a".

We believe, as stated in the petition (p. 11), that a clear and pertinent conflict exists between the decision below and the simultaneous decision of the Ninth Circuit in *Panaview* (116 U. S. P. Q. 493). Respondent answers

that, in both cases, the Court held that there was ambiguity. We submit that the Ninth Circuit properly held that ambiguity is resolved by looking to "the circumstances under which the contract was made." (Respondent's brief, p. 17). In each case, that was done by the respective District Judge. In *Panaview*, the Circuit Court held that, absent clear error, it was bound by the District Court's findings of fact as to those surrounding circumstances. In the instant case, comparable findings by the District Court were ignored below and the matter treated *de novo*.

As to Respondent's Argument

As to the remaining four reasons for granting the writ, the opposing brief responds in the main by denying their existence, but hardly seeking to meet the postulates which the petition advances.

For example, respondent denies that the opinion below is incomplete, unclear and confusing and, in support of such denial, asserts that the Court of Appeals properly declined to decide the rights of the parties, should Huber's membership cease in the future. But respondent refuses to discuss petitioner's showing, not that the Court refrained from ruling *in futuro*, but that it missed the gravamen of the action.

QBA's extension of the Strochmann license into a part of the Huber's territory brought about this litigation. And Huber's failure to exploit within such territory brought about that extension. Yet, in the decision holding the Huber license to be exclusive, Huber's obligation to exploit (petition, p. 16), which is a corollary of such holding, has been completely ignored and a permanent injunction issued, without taking into consideration the necessity of either present exploitation or future QBA membership.

The decision, thus, places the parties back into the position which they occupied when, in December, 1951 (Plaintiff's Exhibits 129, 132, Record pp. 741a, 752a), Huber was invited by the Board to discuss the Philadelphia situation, his own failure to exploit and the proposed extension to Stroehmann, an invitation which Huber declined.

If Huber had reasonably exploited, as he repeatedly promised to do, the interests of his fellow licensees would not have been prejudiced, there would have been no vacuum and no necessity for the extension. Indeed, QBA repeatedly deferred action upon this membership matter in reliance upon such repeated promises vigorously to exploit.

If Huber was then under no duty to exploit, his rights as a licensee were then, and have since remained, non-exclusive.

If Huber's license then was exclusive, his failure to exploit constituted a breach and justified QBA's extension to Stroehmann.

And, if Huber's license is now held to be exclusive, he must now be required to exploit reasonably, as behooves the holder of an exclusive license.

Relegating the parties to "F. R. C. P. Rule 60" (Respondent's brief, p. 19) is hardly an answer to over five years of litigation.

Conclusion

Petitioners urge that the decision herein should be reviewed in the interest of the numerous large and growing non-profit cooperatives, their basic objectives, significant activities and expanding memberships, as well as in the

interest of those who grant and those who receive licenses, whether under trade marks registered pursuant to the Lanham Act, or under patents, copyrights or sundry proprietary rights.

The petition prayed for should be granted.

Respectfully submitted,

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